NO. 35021-1-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

STANLEY SCOTT SADLER,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Vicki L. Hogan, Judge

OPENING BRIEF OF APPELLANT

RITA J. GRIFFITH
Attorney for Appellant

1305 N.E. 45th Street, #205
Seattle, WA 98105
206) 547-1742

TABLE OF CONTENTS

TABLE OF CONTENTS -- cont'd

TABLE OF CONTENTS -- cont'd

Page

TABLE OF CONTENTS -- cont'd

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

TABLE OF AUTHORITIES -- cont'd

Page

TABLE OF AUTHORITIES -- cont'd

Page

TABLE OF AUTHORITIES -- cont'd

Page

TABLE OF AUTHORITIES -- cont'd

Page

TABLE OF AUTHORITIES -- cont'd

Page

TABLE OF AUTHORITIES -- cont'd

Page

FEDERAL CASES

TABLE OF AUTHORITIES -- cont'd

Page

TABLE OF AUTHORITIES -- cont'd

Page

TABLE OF AUTHORITIES -- cont'd

Page

TABLE OF AUTHORITIES -- cont'd

Page

OTHER JURISDICTIONS

RULES, STATUTES AND OTHER AUTHORITY

TABLE OF AUTHORITIES -- cont'd

Page

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Mr. Sadler's Batson challenge.

2. The trial court erred in conducting the hearing on the Batson challenge in a closed jury room not open to the public.

3. The trial court erred in denying Mr. Sadler's motion to suppress his custodial statements.

4. The trial court erred in denying Mr. Sadler's motion to supress physical evidence seized at his home.

5. Mr. Sadler assigns error to the trial court's Findings and Conclusions on the Admissibility of Evidence Pursuant to CrR 3.6 and Admissibility of Statements Pursuant to CrR 3.5 as following: Undisputed Facts numbers 11, 12, 15, 16; and Reasons for Admissibility or Inadmissibility of the Evidence numbers 1, 2(A), (B) and (c), (3), (4), (5), (6), (8), (9) and (10). CP 270-276 (Appendix to brief).

6. The trial court erred in allowing the state to present testimonial hearsay.

7. The trial court erred in denying Mr. Sadler the right to present evidence that K.T. told others that she was nineteen years old.

8. The trial court erred in denying Mr. Sadler the right to present evidence that K.T. had told another person that she would show him her birth certificate.

9. The trial court erred in denying Mr. Sadler the right to present evidence of the information K.T. conveyed to him through her profiles on adult websites.

10. The trial court erred in denying Mr. Sadler the right to present evidence to rebut the state's implication that Mr. Sadler knew K.T. was born in Michigan from an interview between her mother and the police.

11. The trial court erred in denying the defense motion for mistrial after Detective Jackson testified that Mr. Sadler had exercised his Fifth Amendment right to remain silent and to counsel.

12. The trial court erred in denying the defense motion for mistrial after the prosecutor asked Mr. Sadler if the reason he had not received a particular e-mail was because he had been in jail after his arrest.

13. The prosecutor committed misconduct in closing argument by arguing a definition of a critical word without any basis.

14. The trial court erred in not giving Mr. Sadler's proposed supplemental instruction defining the term that the jurors asked for clarification of.

15. Cumulative error denied Mr. Sadler a fair trial.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court deny Mr. Sadler and the prospective jurors their state and federal constitutional rights to equal protection in denying Mr. Sadler's Batson challenge where the state used peremptory challenges to excuse the only two African-Americans on the jury panel and where its "race-neutral" reasons for excusing them included that they were "not intelligent" and where the state did not excuse other Caucasian jurors with military backgrounds?

2. Did the trial court deny Mr. Sadler his state and federal constitutional rights to an open and public trial by conducting the hearing on the Batson challenge in the jury room, outside the presence of the public, and did so without applying the Bone-Club factors?

3. Did the trial court deny Mr. Sadler his state and federal constitutional right to remain silent by denying his motion to suppress his custodial statements where the two officers who testified on the point disagreed about when the Miranda warnings were given and where the lead detective engaged in further interrogation after Mr. Sadler asserted his right to counsel?

4. Did the trial court deny Mr. Sadler his state and federal constitutional rights against unreasonable searches and seizures in denying Mr. Sadler's motion to suppress the physical evidence against him where the officer's warrantless search of Mr. Sadler's house was not justified by any exception to the warrant requirement, he did not consent to the search and the protective sweep was not necessitated by any reasonable belief that there was another person in the house or that such a person was dangerous?

5. Did the trial court deny Mr. Sadler his state and federal constitutional rights to confront the witnesses against him in allowing the state to present the testimonial hearsay of the alleged victim, who did not present as a witness at trial?

6. Did the trial court deny Mr. Sadler his state and federal constitutional right to appear and defend at trial, to present evidence in his own behalf and to compulsory process by excluding evidence relevant to his affirmative defense and by excluding evidence relevant to rebut evidence introduced by the state at trial?

7, Did the trial court err in excluding evidence on hearsay and foundation grounds where the evidence was not being introduced for the truth of the matter asserted, where it fit within exceptions to the hearsay rule and where hearsay is admissible when the state introduces the out-of-court assertions of a non-testifying witness?

8. Did the trial court err in denying Mr. Sadler's motion for a mistrial, and deny him his state and federal constitutional rights to remain silent, after the lead detective testified that Mr. Sadler exercised his right to remain silent and to counsel?

9. Did the trial court err in denying Mr. Sadler's motion for mistrial, and deny him his state and federal constitutional rights to the presumption of innocence, where the prosecutor asked Mr. Sadler if he had not seen a piece of evidence because he was in jail pending trial?

10. Did the prosecutor commit misconduct in closing argument and deny Mr. Sadler his state and federal constitutional rights to a fair trial by telling the jurors, without any support in the court's instructions, that the phrase "requiring production" of identification did not include showing the identification by webcam?

11. Did the trial court err and deny Mr. Sadler his right to a jury instruction which allowed him to argue his theory of the case and which correctly stated the law by refusing to instruct the jury on the dictionary definition of "production," after the jury requested further definition?

12. Did cumulative error deny Mr. Sadler his state and federal constitutional rights to a fair trial?

C. STATEMENT OF THE CASE

1. Overview and procedural history

The thirty-eight charges the Pierce County Prosecutor's Office filed against Stanley Scott Sadler arose from his contact with K.T. in September 2004. CP 1-5, 79-80, 235-237; RP 11346-1347 Mr. Sadler and K.T. met after they each posted profiles on adult websites for persons interested in bondage and domination. RP 1073, 1075, 1077, 1850. Although K.T. advertised herself as nineteen years old, she was actually fourteen years old at the time. RP 1261, 1345, 1739, 1919.

As a result of their meeting, sexual activity and photographing sessions, Mr. Sadler was charged with kidnapping in the first degree (Count I), rape of a child in the third degree (Counts II, III, IV), sexual exploitation of a minor (V-VII, IX, XII, XXIII, XVII, XXIII, XXVIII); possession of depictions of minors engaged in sexually explicit conduct (Counts VIII- X, XI, XIII-XVI, XVIII-XXI, XXIV-XXVII, XXIX-XXXV), and dealing in depictions of minors engaged in sexually explicit conduct

(Counts XXXVI-XXXVIII). CP 6-22. The jury, after trial before the Honorable Vicki L. Hogan, convicted Mr. Sadler only of the eight counts of sexual exploitation of a minor, and acquitted on every other count. CP 473-535.

On July 24, 2006, Judge Hogan imposed concurrent 120-month standard range sentences for the sexual exploitation of a minor convictions. CP 577-579. Mr. Sadler subsequently filed a timely Notice of Appeal. CP 587.

2. Pretrial exclusion of evidence

Mr. Sadler engaged in sex with K.T. and photographed her engaged in sexually explicit conduct believing that she was nineteen years old. RP 1965-1966, 1987. For that reason, his defenses at trial were: (a) the statutory defense to rape of a child that he reasonably believed K.T. was older because of her representations to him that she was nineteen years old, (b) the statutory defense to possession of depictions of minors that he did not have facts leading him to reasonably know that K.T. was a minor and (c) the statutory defense to sexual exploitation of a minor that he made a bona fide attempt to ascertain her age by requiring production of her birth certificate and other identification. C) 416, 427, 433. The issues for the jury at trial, therefore, were K.T.'s representations about her age,

whether Mr. Sadler reasonably believed she was nineteen and whether she produced a copy of her birth certificate or either a Washington identification or driver's license for Mr. Sadler.

By the time of trial K.T. had disappeared and was not available to testify or to be cross-examined by the defense. RP 7. The state moved in limine to preclude Mr. Sadler from introducing evidence that K.T. represented to others that she was nineteen years old and to preclude evidence of her sexual precociousness and activity with others. CP 263-269. The defense agreed that it would not seek to admit evidence of her sexual conduct, but sought to introduce evidence of K.T.'s consistent and habitual portrayal of herself as nineteen. RP 101-102. Defense counsel argued that this evidence was not hearsay because it was not for the truth of the matter asserted -- that she was in fact nineteen years old -- and that it was relevant to Mr. Sadler's statutory defenses; counsel argued that K.T. was in the habit of portraying herself as nineteen to older men and did so to at least six men whose identities had been confirmed by the police. RP 103-104, 112, 127-132. The police also had confirmed that K.T. advertised on six different adult sites as a nineteen-year-old single white female interested in bondage and discipline. RP 105-106. Defense counsel argued that this was evidence of habit, and necessary to explain how Mr.

Sadler's meeting with K.T. came about and to support his reasonable belief that she was nineteen. RP 106-107, 109-110, 113, 115, 120, 154.

The trial court excluded the evidence on hearsay and relevance grounds. CP 360-369.RP 110, 124, 146, 151, 184-186, 196. The court excluded evidence of K.T.'s contact with men from other states, of her sexually-explicit internet chats with other men, of her representing to any other person besides Mr. Sadler that she was nineteen, and of her profiles on adult websites. CP 360-369. The court's order granted the right to renew the motion relating to adult web sites and K.T.'s profiles if relevance was established and to renew other motions if the defense believed that the door to admission of evidence had been opened. CP 360-369.

3. Batson challenge

At the close of voir dire, defense counsel challenged the state's exercise of peremptory challenges to exclude the only two African-Americans on the juror panel, prospective jurors number 2 and 27. RP 855-857, 897-904.

The state responded that there were other minorities on the panel and that juror 27 had misrepresented his criminal history, was very "slow and deliberate" in his answers, was not open in his participation and was not intelligent. RP 857-859. For number 2, the state indicated that he

either could not read or could not understand the word "sadomasochism," that he had a military background in common with Mr. Sadler and that he had three sons where the state was looking for jurors with more experience with teenage girls. RP 859-860.

In reply, defense counsel argued that Batson referred to racial classifications and not minorities in general, and noted that both jurors number 18 and 22 also had military backgrounds.[1] RP 860-861. Defense counsel noted further that the state had tried to save juror number 17, who was retired from the military, from being excused, and that other jurors had trouble with the concept of sadomasochism. RP 552, 557-558, 589-590, 678, 712-720, 861. Juror 17, in fact, had said that he did not know what sadomasochism meant, at the time number 2 indicated it included a "Satan type of a relationship." RP 674.

---

[1] The state responded "Mr. Schwartz [defense counsel] says that the State wasn't going to perempt No. 18 and 22 who are both in the military. 18 was, 22 is. And I suppose the State could have burned a challenge, but it's presumptuous to delay. We weren't going to use perempts for those two when the challenges weren't complete and he peremptoried them first." RP 862. In fact, defense counsel had challenged juror 22 for cause during voir dire because of her prior experience as a child and her statement on the questionnaire indicating that she did not think she could be fair and impartial. RP 349-358. The state opposed the challenge stating that juror 22 was "very honest." RP 365. The court denied the defense challenge. RP 367.

Juror 27 agreed in his questionnaire and during individual voir dire that he had been arrested in the past for DUI and assault domestic violence; he agreed that the process had been fair and that he deserved his punishment. RP 372-375. Juror 27 was questioned further when the prosecutor found that he had multiple DUIs, domestic violence and a possession of marijuana charge. RP 442-443. Juror 27 explained that the possession of marijuana charge had been dismissed, and that a friend had told him that he need only inform the court and parties generally of the nature of his charges because the state would run his criminal history. RP 497, 858. Juror 27 explained that alcohol had been a big factor in his difficulties when he came out of the army, but that after six weeks of treatment in a Naval hospital he no longer had a problem with alcohol. RP 500. Juror 27 suffered from PTSD but assured the court that this would not be triggered by the sexual material which would be admitted at trial. RP 500-501.

Juror 2 agreed that the state was obligated to put on a case and the accused was entitled to raise a reasonable doubt from the state's case and that a person was innocent until proven guilty. RP 473-480. Juror 2 expressed his opinion that whether a defendant could be found not guilty if his attorney did not cross examine witnesses or present a case depended

on what the prosecutor had to say in his case. RP 480-481. Both jurors 22 and 18 expressed similar views that the defendant was not obligated to do anything and could conceivably be found not guilty if he did nothing. RP 476, 482.

Jurors 2, 18 and 22 all expressed views on the appropriate age to vote, serve in the military and give consent to be photographed in sexually explicit conduct. RP 514, 524, 526. They all expressed opinions on the question of whether a person should be held responsible where the other person held himself or herself out as of age. RP 556-557, 559. Juror 2 indicated that in the instance of an underage person in a bar, the effects of alcohol go away, where the same might not be true of the effects of an underage sexual encounter. RP 565. He indicated that it was important to be as fair as possible. RP 813.

Juror 18 had been fooled about drugs in the past with regard to a soldier who had been dependable and always on time. RP 815.

Juror 27 indicated his understanding that adult relationship websites were places to meet and find the opposite sex, although he did really know about such sites. RP 597. He indicated that one could not judge a person as a sex offender based on stereotypes. RP 646. Juror 27 had been a

witness in a court martial; number 18 had also participated in a court martial. RP 765.

Neither Juror 2 nor 27 expressed an inability to follow the court's instructions or the law; neither expressed any bias towards either party.

The court denied the Batson challenge, ruling that there was no pattern of eliminating a class of jurors and that there were multiple reasons for excluding Jurors 2 and 27. RP 862.

The prosecutor indicated for the record that all counsel and Mr. Sadler were in the jury room, rather than the courtroom, having the Batson hearing outside the presence of the jury but in the presence of the defendant. RP 862-863.

4. Trial testimony

Mr. Sadler and K.T. discovered one another through adult websites on the Internet.[2] RP 1861, 1847, 1851, 1907-1910. They met in person in late August, 2004, in Camas, Washington, near where Mr. Sadler was camping with his three children. TP 1353-1354, 1421-1425, 1428, 1915, 1920-1926, K.T. returned with him to his home in Fircrest, Washington,

---

[2] These websites require that persons advertising on them certify that they are of age. RP 1862. To post and interact on the websites, a person must have a credit card. RP _____.

when the camping trip was over and the children returned to their mother's home. RP 1926, 1930.

K.T. joined a long-standing dominance relationship between Mr. Sadler and Rachel Haugenberry, a twenty-nine-year old woman who lived in Kansas City, Missouri, who had also met Mr. Sadler through an adult website on the Internet. RP 995, 1000, 1011-1013, 1178-1179, 1861-1892.

Mr. Sadler and Ms. Haugenberry were involved in an elaborate master-slave relationship that took place by phone, instant messaging, e-mail and two in-person visits by Ms. Haugenberry. RP 1014-1018, 1030-1031, 1037, 1864-1897. The second visit occurred shortly after K.T. joined Mr. Sadler. RP 1983-1988.

There was no doubt that the relationship between Mr. Sadler and Ms. Haugenberry was intense and involved bondage, humiliation and elaborate sexual and bondage equipment. RP 1005-1006, 1011-1018, 1024, 1026, 1028, 1039-1043, 1053, 1071-1073, 1075. A part of the relationship involved blackmail--Mr. Sadler's threat to reveal Ms. Haugenberry's activities with him to her family. RP 1015-1021, 1061, 1876, 1884. At trial Mr. Sadler described this blackmail as part of the role playing they were engaged in and an agreed-upon substitute for Ms. Haugenberry's desire to be abducted by him. RP 1858, 1864, 1866, 186901870, 1878, 1880-

1884, 1890-1891, 1894, 2441, 2490. Ms. Haugenberry, who had not been charged with a crime in spite of her sexual activity with K.T., testified at trial that the blackmail was real and was her motivation for remaining in a relationship with Mr. Sadler. RP 1015-1017, 1021-1022, 1032, 1290, 1292.

It was undisputed that Ms. Haugenberry and K.T. engaged in sexual acts with one another, some of which were photographed by Mr. Sadler. RP 1081-1084, 1087-1088, 1100, 1107-1108, 1123, 1138-1139, 2305, 2318-2319, 2345. There were also photographs of Ms. Haugenberry and K.T. in bonds and photographs of K.T. engaged in sex acts with Mr. Sadler.[3] RP 1126-1129, 1143, 1145. Mr. Sadler sent three of these photographs to two of his friends. RP 1481-1488, 1553, 1563-1564. The equipment used in the photographs was seized as evidence and introduced as exhibits at trial, as were the photographs and chat sessions among K.T., Mr. Sadler and Ms. Haugenberry and between Mr. Sadler and Ms. Haugenberry. RP 1093, 1100, 1458, 1606-1629, 1677-1681, 1690.

Ms. Haugenberry was able to confirm that K.T. represented herself as being nineteen, that K.T. was not generally restrained at Mr. Sadler's house, that K.T. said that she would have to get her identification because

---

[3] The facts relevant to the CrR 3.5 and 3.6 hearings are set forth in the argument on those issues.

she wanted to go to an adult club, and that Mr. Sadler offered to take her home, but she declined to go. RP 1083, 1085, 1106, 1259. Mr. Sadler's daughter was able to confirm that K.T. was alone many times when she was camping with them, and that she was alone in the truck while Mr. Sadler was with her at school prior to her volleyball practice after they returned from camping . RP 1431-1432, 1437, 1440, 1443.

Mr. Sadler testified that shortly before he met K.T. in Camas, she showed him her Michigan birth certificate and either a Washington driver's license or ID card via webcam. RP 1917. K.T.'s mother, Debra Farnam, confirmed that K.T. visited at home at that time from foster care, and hooked up the webcam to the computer then. RP 2001-2003. Ms. Farnam further testified that K.T.'s birth certificate was missing from the locked box in which it was kept. RP 1997-1998. Clark County Sheriff's Deputy Russ Thomas confirmed that K.T. last logged onto an adult website on August 22, 2004. RP 1847-1851. Tacoma Police Officer Richard Voce confirmed August 22, 2004, as the last time K.T.'s screen name appeared on Mr. Sadler's computer. RP 1834-1835.

5. Motions to revisit pretrial rulings

After Mr. Sadler's direct testimony, defense counsel asked the trial court to revisit its pretrial ruling excluding an internet message between

K.T. and "MasterGyre," Exhibit 153, stating that she was nineteen and that she would show him her birth certificate to prove it. RP 2385-2385, 2422. The message to "MasterGyre," a man named David who lived in Tennessee, was sent on August 22, 2004, when K.T.'s mother found the webcam hooked up and the date Mr. Sadler saw the birth certificate via the webcam. RP 2422-2425. The message to "MasterGyre" stated, "I can send you a copy of my birth certificate." RP 2424. Defense counsel did not seek to introduce the entire exhibit, but to introduce only the evidence that K.T. offered to provide another person with a copy of her birth certificate at the time when Mr. Sadler testified that he saw the certificate via webcam. RP 2431.

Before the court ruled on the defense motion, the prosecutor asked Mr. Sadler on cross-examination if there was only his word that he identified K.T. by her birth certificate. RP 2415.

The trial court refused to reconsider its pretrial rulings excluding the evidence on grounds of hearsay, foundation and authentication. RP 2431.

The court also refused to permit Mr. Sadler to introduce K.T.'s profiles posted on Collarme.com, Exhibit 132, or SexyAds.com, Exhibit 146, which included her preferences for bondage, oral sex and "nipple

clamps," a device used in a picture admitted at trial and about which the state questioned Mr. Sadler. RP 1934-1939, 1946. Defense counsel argued that information from K.T. to Mr. Sadler was exempted from the pretrial exclusion and that the information was relevant to the effect it had on Mr. Sadler. RP 1935, 1936, 1938.

The trial court excluded the testimony of a defense investigator who would testify that Mr. Sadler told him that K.T.'s birth certificate was from Michigan before her mother disclosed this in an interview with the lead detective in the case. RP 2513-2517. The prosecutor had asked Mr. Sadler about the interview during cross-examination; the prosecutor asked Mr. Sadler if it was "safe to assume" he had read the taped interview in which K.T.'s mother indicated that she was born in Michigan. RP 2393. Ms. Farnam had also been asked if she told defense counsel that K.T. was born in Michigan. RP 2009.

6. K.T.'s statements to the police

At several points during the trial, the defense objected to the introduction of K.T.'s out-of-court statements to the police on confrontation grounds. Fircrest Police Officer Eric Nordling testified that when he saw K.T. in Mr. Sadler's home she was lying on the bed and did not respond to him until he touched her foot. RP 1718, 1724. Then, over defense

objection, Nordling was permitted to testify that she said that her stomach and head hurt, and that she did not respond when asked how old she was.[4] RP 1724. Fircrest Police Officer John Villamor was permitted to testify, over defense objection, that he interviewed K.T. a short time later and passed on the information from K.T. to Detective Jackson, that the conversation included K.T's identification of particular items that were in the house and that the identified items were collected. RP 1601-1602. Villamor then described items he took into evidence. RP 1610-1638.

Detective Jackson testified that he decided to get a search warrant and wanted to establish probable cause. RP 1651. Defense counsel objected when the state asked Jackson if, given that he knew there was S&M stuff and that K.T. was underage, he made sure that K.T. was interviewed before he sought the warrant. RP 1651. Defense counsel objected both to testimony that a judge determined that there was probable cause that a crime had been committed and to the inference that K.T. said something to support the state's case. RP 1652. The court overruled the objection, and the state elicited that K.T. was interviewed and her information included in the warrant affidavit. RP 1655-1658.

---

[4] The parties stipulated that K.T. was taken to Mary Bridge Hospital and when she was examined in the emergency room the doctor observed no signs of injury or physical trauma. RP 1742, 1846.

7. Motions for mistrial

Defense counsel moved for a mistrial twice during the course of the trial. The first motion was in response to lead detective Robert Jackson's testimony, after specifically being cautioned outside the presence of the jury, that when Mr. Sadler told him that K.T. told him she was nineteen, Jackson responded, "Hey, I'm not asking questions, you asked for an attorney." RP 1657, 1660. Defense counsel asked for a mistrial on the grounds that this commented on Mr. Sadler's exercise of his right to remain silent and because the jury heard that Mr. Sadler was uncooperative. RP 1660-1665. The court sustained the objection and instructed the jury to disregard the testimony, but denied the motion for a mistrial. RP 1665-1666, 1673.

The defense moved again for a mistrial during the state's cross examination of Mr. Sadler when the prosecutor asked Mr. Sadler if the reason he did not receive Ms. Haugenberry's e-mail to him was because he had been in jail for the past eighteen months. RP 2089-2090, 2112-2118. The court agreed that the question was inappropriate, but concluded that "when viewed against the backdrop of the evidence" in the case, did not taint the case so as to require a mistrial. RP 2118.

8. Closing arguments

In closing argument the state argued that K.T. was an eyewitness because she was in the photographs:

> There is also, quite frankly, an eyewitness. K.T. is also an eyewitness to that, even though she is not here, because it's K.T. in the picutes engaging in the conduct. And so the defense, if they can't prove I did these contacts, won't fly.

RP 2597-2598.

In closing rebuttal argument, after the defense had no further opportunity to address the jury, the state argued that presenting the birth certificate over a webcam could not meet the definition of "requires production" in Instruction No. 27:

> Instruction No. 27 requires production of the identification, not a request to see it on a webcam. When someone goes to buy alchol or cigarettes or something like that, the store clerk doesn't say, can you give me a copy of your driver's license. The law requires production, not seeing it over a fuzzy webcam, production of the document.

RP 2670- 2671. The prosecutor continued, "They need to see the actual license, the actual document, production of the document. Not show it to me; prove it to me." RP 2670.

9. Jury question

During the course of deliberations, the jurors sent out a note saying, "We need the definition of the words 'requiring production' as they are

written in the Instructions # 27." CP 394-395; RP 2686. Michael Schwartz, the defense attorney, was not able to come to the hearing on how to respond to the question, and another attorney covered the hearing. Substituted counsel agreed with the given response, "No additional instructions or definitions will be provided." CP 394-395; RP 2687-2688.

When Mr. Schwartz learned of the question and before the jurors announced that they had reached a verdict, he e-mailed a proposed supplemental instruction based on the question. RP 2689. The instruction -- "the term production means the act of producing or to offer to view or notice" -- from Webster's Dictionary (2006 edition). RP 2689. Counsel further proposed that the instruction be given along with a further instruction that they begin deliberating at the point where they had raised the question about the term production. RP 2695-2696. The court denied the request. RP 2696.

10. Sentencing

The Department of Corrections recommended an exceptional sentence below the standard range, for 60 months. RP 2736. The presentence reported concluded that he could find no substantial evidence that Mr. Sadler was aware of K.T.'s correct age and defense counsel pointed out that this was reflected in the jury's verdict. RP 2723. Further,

the risk assessment by the DOC determined that Mr. Sadler was a low risk for reoffense. RP 2737.

The court nonetheless imposed sentences of 120 months, the statutory maximum for the convictions. RP 2742-2743.

D. ARGUMENT

1. THE TRIAL COURT ERRED IN DENYING MR. SADLER'S BATSON CHALLENGE.

Scott Sadler should be given a new trial because the prosecutor excused the only two African-Americans on the jury panel for reasons which were only a pretext for discrimination. The prosecutor described the two African-Americans in perjorative terms such as not intelligent, "slow and deliberate," or not understanding. RP RP 857-859, 859-869. These descriptions were not supported by the record and were particularly invidious because there was nothing subtle or difficult about the evidence at trial.

Although Juror 2 was unfamiliar with the word "sadomasochism," so were other jurors. RP 674. Nor was the term "sadomasochism" in any way central to the trial; the many pictures introduced by the state at trial were explicit and not dependent on arcane understanding of sexual preferences. Both Jurors 27 and 2 were in the military, as was Mr. Sadler, but there were other jurors in the military that the state made

particular efforts to try to keep on the panel. RP RP 349-358, 365, 860-862.

The answers provided by Jurors 27 and 2 were similar to answers provided by other prospective jurors and neither suggested any bias or inability to follow the instructions of the court.[5]

Although Juror 27 had criminal history consisting of DUI's, possession of marijuana and domestic violence which the state felt he had not been sufficiently candid about in his questionnaire, Juror 27, when asked, discussed his past openly, explained his problem with alcohol when he got out of the Army and described how he had successfully dealt with this problem. RP 372-375, 442-443, 497, 500-501.

Taken together, excusing both African-American jurors, the only two African-Americans on the panel, and describing them as not intelligent gives rise to a clear inference of racial discrimination that the prosecutor only underlined by chosing their military service and the fact that one had teenage sons as "race neutral" reasons for excusing them. These reasons were pretexts for using peremptory challenges on the basis of race and require reversal of Mr. Sadler's convictions. The state had tried to keep on the jury other, non-African-Americans with military backgrounds. RP

---

[5] The relevant voir dire is set out in greater detail in the "Statement of the Case" of this brief.

349-358, 365, 367, 589-590, 678, 712-720, 861. Further, the state did not focus on questions to determine whether prospective jurors had sons or daughters or how this might influence their opinions. Neither military service nor teenage sons were grounds for excusing other jurors and pretexual reasons for excusing all of the African-American jurors.

Each party at trial, as a general rule, has the right to exercise peremptory challenges against potential jurors without giving a reason. RCW 4.44.140; CrR 6.4(e)(1). But under the equal protection clauses of the federal and state constitutions, a peremptory challenge "may not be exercised to invidiously discriminate against a person because of gender, race, or ethnicity." State v. Evan, 100 Wn. App. 757, 763, 998 P.2d 373 (2000); Batson v. Kentucky, 476 U.S. 79, 90 L. Ed. 2d 69, 106 S. Ct. 1712 (1986); Powers v. Ohio, 499 U.S. 400, 406, 113 L. Ed. 2d 411, 111 S. Ct. 1364 (1991). "Race-based peremptory challenges violate both a defendant's equal protection right . . . . and the equal protection rights of the excluded jurors who are denied a significant opportunity to participate in civic life." State v. Rhodes, 82 Wn. App. 192, 195, 917 P.2d 149 (1996). The United States Constitution and the Washington Constitution prohibit a prosecutor from using peremptory challenges to exclude

otherwise qualified and unbiased persons from a jury on the basis of race. State v. Sanchez, 72 Wn. App. 821, 825, 867 P.2d 638 (1994).

The discriminatory use of a peremptory challenge is structural error which is not amenable to harmless error analysis. United States v. Annigoni, 96 F.3d 1132 (9th cir. 1996).

The Supreme Court, in Batson, articulated a three-step inquiry for determining whether the exercise of a peremptory challenge was a product of racial discrimination. The first step requires the defense to make a prima facie showing that the state exercised its challenges on the basis of race. Hernandez v. New York, 500 U.S. 352, 358, 114 L. Ed. 2d 395, 111 S. Ct. 1859 (1991); Rhodes, 82 Wn. App. at 196. The defendant's initial burden of establishing a prima facie case of discrimination is two-pronged: (1) he must "first show that the peremptory challenge was exercised against a member of a constitutionally cognizable group," and (2) he must "show that the . . . peremptory challenge" and "other relevant circumstances raise an inference of discrimination." State v. Wright, 78 Wn. App. 93, 99, 896 P.2d 713 (1995) (quoting State v. Sanchez, 72 Wn. App. 821, 825, 867 P.2d 638 (1994)).

Once a prima facie showing is made, the burden shifts to the state to articulate a race-neutral explanation for its challenges. Hernandez, 500

U.S. at 358-359. If the state is able to articulate a race-neutral justification, step three requires the trial court to determine whether the state's explanation is a pretext. Hernandez, at 359.

In the third step, the trial court has "the duty to determine whether the defendant has established purposeful discrimination." Batson, 476 U.S. at 98. The court must evaluate the "persuasiveness" of the prosecutor's proffered reasons. Purkett v. Elem, 514 U.S. 765, 768, 131 L. Ed. 2d 834, 115 S. Ct. 1769 (1995). "[I]f a review of the record undermines the prosecutor's stated reasons, or many of the proffered reasons, the reasons may be deemed a pretext for racial discrimination." Lewis v. Lewis, 321 F.3d 824, 830 (9th Cir. 2003); United States v. Chinchilla, 874 F.2d 695, 698-699 (9th Cir. 1989) (holding that although reasons given by a prosecutor "would normally be adequate 'neutral' explanations taken at face value, the fact that two of the four proffered reasons do not hold up under judicial scrutiny militates against their sufficiency"); Johnson v. Vasquez, 3 F.3d 1327, 1331 (9th cir. 1993) ("When there is reason to believe that there is a racial motivation for the challenge, we are not bound to accept at face value a list of neutral reasons that are either unsupported in the record or refuted by it").

More specifically, reasons for a peremptory challenge put forth by the state which are tantamount to assumptions about racial stereotypes do not constitute "racially neutral" reasons under Batson. In State v. Burch, 65 Wn. App. 828, 840, 830 P.2d 357 (1992), the court concluded that the exclusion of a prospective juror "on the basis of group membership or stereotypical assumptions about members of certain groups does not constitute a neutral explanation." The deputy prosecutor, in Burch, stated that she challenged one of the jurors because she was "uneducated" and "appeared to be easily swayed" by the defendant's mother's testimony. Because there were no reasonably specific responses during voir dire to support these conclusions, the court concluded that the challenge to the jurors was founded on stereotypical assumptions about women being "easily swayed" by appeals to their emotions. Burch, 65 Wn. app. at 842-844. The Arizona appellate court reached a similar holding in Arizona v. Lucas, 18 P.3d 160 (2001),. where the only African-American male in the panel was struck because he was a southern male and the prosecution argued that he would therefore have a negative view of pregnant women who worked.

Similarly in United States v. Bishop, 959 F.2d 820, 822 (9th Cir. 1992), the court held that an attorney who removed a black juror because she lived and worked in a predominantly low-income, black neighborhood

and was therefore likely to believe the police "pick on black people" did not provide a racially-neutral reason for the challenge. Of critical importance to the Bishop court was the "assumption that one who lives in an area heavily populated by poor black people could not fairly try a black defendant." Bishop, at 820. The court noted, as well, that the prosecutor also mentioned the juror's age and employment, while the prosecutor had not stricken another juror who had the same job but lived in a different community. Bishop, at 820. It was the reliance on racial stereotyping that made the explanation unacceptable. Bishop, at 820.

In Miller-El v. Dretke, 545 U.S. 231, 240-241, 125 S. Ct. 2317, 162 L. Ed. 2d 196 (2005), the court held that where ten of eleven African-American venire panelists were peremptorily struck compared to white panelists who were not, the inference of discrimination was inescapable. The court held that "[i]f a prosecutor's proffered reason for striking a black pan3list applies just as well to an otherwise similar non-black who is permitted to serve, that is evidence tending to prove purposeful discrimination." Miller-El, at 241. This is consistent with the decision in Rice v. Collins, 546 U.S. 333, 338-341, 126 S. Ct. 969, 163 L. Ed. 2d 824 (2006), where the Supreme Court upheld the peremptory challenge excusing a young black woman because of her youth was a plausible non-

discriminatory reason for challenging her and where other white jurors were excused for the same reason.

In this case, there were two African-Americans on the jury and the prosecution used peremptory challenges to excuse both of them. The state excused Juror 27 because of its claim that he had not been sufficiently candid about his criminal history, he was "slow and deliberate" in his answers, he did not openly participate in voir dire and he was not intelligent. RP 857-859. For juror 2, the state indicated that he could not read or understand the word "sadomasochism," he had a military background in common with Mr. Sadler and he had sons rather than teenage daughters. RP 859-860.

The defense made a prima facie showing because the state excused the only two African-Americans on the jury panel and did so in circumstances giving rise to an inference of discrimination. In particular, the state characterized both Juror 27 and Juror 2 in derogatory terms, impugning their intelligence. RP 857-860.

The state's reasons should be viewed as discriminatory because they were denigrating of the intelligence of the two African-American men and the reasons which did not denigrate their intelligence were not reasons for

excusing other potential jurors. The trial court erred in denying the Batson challenge and Mr. Sadler's convictions should be reversed for that reason.

2. THE TRIAL COURT ERRED IN CONDUCTING THE HEARING ON THE BATSON CHALLENGE IN THE JURY ROOM RATHER THAN THE OPEN COURTROOM, DENYING MR. SADLER HIS STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO A PUBLIC TRIAL.

Mr. Sadler's convictions should be reversed and his case remanded for retrial because he was denied his state and federal constitutional rights to a public trial, as guaranteed by article 1, section 22 of the Washington Constitution and the Sixth Amendment to the United States Constitution.[6] The error is not subject to a harmless error analysis. State v. Easterling, 157 Wn.2d 167, 181, 137 P.2d 825 (1996).

The court excluded the public from the hearing on the Batson challenge without following the required procedure for conducting a hearing outside the presence of the public. The public had a right to know that the prosecutor was excusing all of the African-American jurors from the jury panel and doing so by denigrating their intelligence; Mr. Sadler had the right to have the hearing take place in an open and public courtroom. The

---

[6] "Justice in all cases shall be administered openly, and without unnecessary delay." Article 1, section 10. This gives the public and the press the right to open courtroom proceedings. Seattle Times C. v. Ishikawa, 97 Wn.2d 30, 36, 640 P.2d 716 (1982).

public's right to be present should, in fact, be particularly strong where there is a Batson challenge; a Batson challenge is protective of the rights of the members of the public called to jury duty as well as the rights of the specific defendant.

As held in Waller v. Georgia, 467 U.S. 39, 44-45, 104 S. Ct. 2210, 81 L. Ed. 2d 31 (1984),

> The requirement of a public trial is for the benefit of the accused; that the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and the importance of their function.

(quoting In re Oliver, 333 U.S. 257, 270, n.25 (1945); 1 T Cooley, Constitutional Limitations (8th Ed. 1927)).

The right to a public trial extends to pretrial proceedings, Press-Enterprise Co. v. Superior Court, 478 W. S. 1, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986), and to voir dire. In re Personal Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004); Waller v. Georgia, 467 U.S. at 45 (the right to a public trial extends to suppression hearings).

In this case, Mr. Sadler was denied his right to a public trial when the court conducted the hearing on the Batson challenge in the jury room rather than the open public courtroom. RP 862-863.

In Easterling, the Washington Supreme Court reiterated that "[t]his court has strictly watched over the accused's and the public's right to open public criminal proceedings." Easterling, 157 Wn.2d at 174 (citing State v. Brightman, 155 Wn.2d 506, 509, 122 P.3d 150 (2005) (reversible error to close the courtroom during jury selection); Orange, 152 Wn.2d at 812 (reversible error to close the courtroom during jury selection); State v. Bone-Club, 128 Wn.2d 254, 256, 906 P.2d 325 (1995) (reversible error to close the courtroom during a suppression hearing)). "[A] trial court may not close a courtroom without, first, applying and weighing the five requirements set out in Bone-Club and, second, entering specific findings justifying the closure order." Easterling, at 175.

Those requirements are: (1) the proponent of closure must show a compelling interest; (2) anyone present when the closure motion is made must be given an opportunity to object; (3) the proposed method of curtailing open access must be the least retrictive means available; (4) the court must weigh the competing interests; and (5) the order must not be broader in application or duration than necessary to serve its purpose. Easterling, at 175, n.5; Bone-Club, at 258-259. It is "the request to close itself, and not the party who made the request, that triggered the trial court's duty to apply the five-party Bone-Club requirements. The trial

court's failure to apply the test constitutes reversible error." Easterling, at 180.

Here, clearly the trial court failed to apply the Bone-Club factors and, in failing to do so, committed reversible error. RP 862-863.

3. THE TRIAL COURT ERRED IN DENYING MR. SADLER'S MOTION TO SUPPRESS EVIDENCE AND HIS CUSTODIAL STATEMENTS.

Fircrest Police Officer Eric Norling testifed at the supression hearing that he went to Mr. Sadler's home in the early evening on September 14, 2004, along with Deputy Rather from the Pierce County Sheriff's Office in University Place. 1RP 10-13.[7] Norling had been dispatched at the request of Clark County to check for a missing fourteen-year-old runaway, K.T., who had been led to Mr. Sadler's address through an Internet address; the dispatch noted that K.T. might be into sadomasochistic sex. 1RP 13-14. Norling knocked on the door, and after some delay, Mr. Sadler opened the door. 1RP 15. According to Norling, Mr. Sadler appeared to be sweating; he agreed that he was Stanley Sadler. 1RP 15-16. When asked if K.T. was there, Mr. Sadler said, "Yes, she is up here," and turned and started up the stairs just inside the door. 1RP 16-17 Without

[7] The suppression hearing is designated "1RP"; all other portions of the verbatim report of proceedings are designated "RP."

being invited in and without asking permission, Norling followed Mr. Sadler up the stairs. 1RP 16-17, 34-36.

On the third floor, in the master bedroom, K.T. was on the bed in a short plaid skirt and top with no underwear. 1RP 17-18. When K.T. responded groggily, Norling asked Deputy Rather to detain Mr. Sadler. 1RP 17-18. Rather called the fire department to check K.T., and Norling went to Mr. Sadler and read him his Miranda warnings. 1RP 18. According to Norling, Mr. Sadler said that K.T. had been at his house about a week, then asked Norling why he asked K.T. how old she was and, without prompting said, "She told me she was nineteen." 1RP 19-20. At that point, Norling first testified, Mr. Sadler asked to speak to an attorney. 1RP 20. Rather checked the rest of the house to make sure there was no one else there. RP 20.

After the fire medical personnel arrived, Norling went, at the request of Deputy Rather, and looked at a room with black plastic on the walls and bondage equipment in it. 1RP 20. Norling then took Mr. Sadler to the patrol car and, when he told him that K.T. was a fourteen-year-old runaway, Mr. Sadler started yelling that she told him she was nineteen; that, Norling testified, was the point when he asked for a lawyer. 1RP 21. When Detective Jackson came over to ask Mr. Sadler for permission to

search his house, Norling remembered, that *that* was when Mr. Sadler asked to speak to an attorney. 1RP 23.

On cross-examination, Norling agreed that he could have detained Mr. Sadler at the outset. 1RP 28-32. Norling also agreed that he had no information that anyone else was at the house and that he did not hear anyone else. 1RP 37.

Deputy Rather testified that he followed Norling and Mr. Sadler up the stairs. 1RP 48-49. Rather started conducting a security sweep of the second floor when Norling called him to the third floor; Rather encountered Mr. Sadler on the stairs and detained him. 1RP 49-50. At Norling's request, Rather handcuffed and pat searched Mr. Sadler and had him sit on the floor. 1RP 51.

Rather testified on cross-examination that he did not hear Norling ask if he could enter the house and could only assume Mr. Sadler knew Norling was behind him. 1RP 63-64. Rather also testified that when K.T. was roused by Norling, he was outside the bedroom with Mr. Sadler; he then called the fire department and completed his security sweep of the house. 1RP 69-70. Rather did not think that Mr. Sadler had been advised of his rights at the time he called Norling to look at the room with the black lining which he found during the "protective sweep." 1RP 71-72.

Detective Jackson testified that after he was called to the scene, he walked through the house taking notes to get the layout so he could describe things in the search warrant, and that he followed the same path as Norling and Rather had used. 1RP 75-79, 87. Only Jackson, however, described the computer room and the video equipment in it. 1RP 89-90.

According to Jackson, he went to Mr. Sadler where he was seated in the back of the patrol car to let him know what he was doing and that he was going to get a warrant. 1RP 79. Jackson testified that he knew that Mr. Sadler was not waiving his rights, but wanted to "keep him up to speed." 1RP 80. Mr. Sadler said a couple of times to Jackson that he thought she was nineteen. 1RP 80.

Defense counsel argued that the state failed to establish that Mr. Sadler had been read his Miranda rights at the time he made his statements, even though he was handcuffed and in custody at the time; counsel pointed out that Norling testified that he advised Mr. Sadler of his rights after the fire department was called, but Rather did not hear Mr. Sadler being advised of his rights at that time. 1RP 104-106. Further, Jackson's later informing Mr. Sadler of what was happening was interrogation because it was reasonably likely to elicit an incriminating response. 1RP 107.

On the CrR 3.6 issue, the defense argued that there was no reason justifying entry into Mr. Sadler's residence without a warrant, either under the community caretaking exception or the emergency exception, and that Mr. Sadler did not consent to the entry. 1RP 108-119.

The trial court denied both motions to suppress. 128-130.

a. CrR 3.5

Mr. Sadler's custodial statements to Officer Norling should be suppressed because the state failed to establish that he was read his Miranda warnings prior to his making the statements. His custodial statements to Detective Jackson should be suppressed because Jackson interrogated him after Mr. Sadler asked to speak to an attorney. Jackson's informing Mr. Sadler that his house would be searched and otherwise keeping him "up to speed" about the investigation were reasonably likely to elicit an incriminating response.

The state may not use custodial statements of a defendant at trial absent proof that the defendant's privilege against self-incrimination was adequately protected by the warnings set out in Miranda v. Arizona, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, 10 A. L. R. 3d 974 (1966); State v. Sargent, 111 Wn.2d 641, 648, 762 P.2d 1127 (1988). Custodial

statements made without proper Miranda warnings are presumed to be involuntary. Sargent, 111 Wn.2d at 647-648.

A statement is custodial for purposes of Miranda, not only when there has been an arrest, but whenever a person's freedom of movement is significantly restrained. United States v. Berkemer, 468 U.S. 420, 441, 82 L. Ed. 2d 317, 104 S. Ct. 3138 (1984) (a person may be in "custody" for purposes of Miranda before he is arrested); Miranda, 384 U.S. at 444 (warnings must be given whenever a person has been deprived of his freedom of action in any significant way). Here, it was undisputed that Mr. Sadler was under arrest when detained by Deputy Rather. CP 270-276.

The state bears the burden of showing a knowing, voluntary and intelligent waiver of Miranda rights. State v. Wheeler, 108 Wn.2d 230, 237-238, 737 P.2d 1005 (1987). Failure to give Miranda warnings and obtain a waiver before obtaining custodial statements requires exclusion of any statements obtained, even those made after belated warnings are given. Missouri v. Seibert, 542 U.S. 600, 124 S. Ct. 2601, 2605, 159 L. Ed. 2d 643 (2004). The Seibert Court expressly interpreted Oregon v. Elstad 470 U.S. 298, 105 S. Ct. 1285, 84 L. Ed. 2d 222 (1985), which held that a second statement could be taken after an initial unwarned

statement, to be limited to instances in which the first statement is brief and made in a good faith neglect of Miranda in a non-coercive atmosphere, and the second statement is in a markedly different setting. Seibert, 124 S. Ct. at 2611-2612. In contrast, where the custodial session is one continuum, the belated Miranda warnings are too late. Seibert, at 2613.

Here, the state failed to meet its burden of proof. Although Norling testfied that he went to Mr. Sadler and read him his warnings shortly after he was detained by Deputy Rather, and just after Rather called for medical aid, Rather testified that he did not recall that Mr. Sadler was advised of his rights at that time. 1RP 18-20, 71-72. Under these circumstances, where the state presented contradictory testimony, it failed to meet its burden of proving that the Miranda warnings were read to Mr. Sadler prior to his making custodial statements. Although the court side-stepped this issue and entered findings only that Norling read the warnings before the statement, the court never determined that Rather was not credible or less credible than Norling. CP 270-276. Further, Norling clearly did not remember the incident and the timing of Mr. Sadler's statements; he testified that Mr. Sadler invoked his right to counsel at three distinctly different times: (1) in the house before Rather made his protective sweep of it, (2) with Mr. Sadler in the patrol car and (3) when Detective Jackson

asked him for permission to search his house.[8] 1RP 20, 21, 23. At best, the state presented contradictory evidence and failed to meet its burden of proving timely Miranda warnings, prior to Mr. Sadler's making custodial statements.

Moreover, Detective Jackson engaged in further "interrrogation" after Mr. Sadler invoked his right to counsel. "Interrogation" includes "not only express questioning, but also any other words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 100 S. Ct. 1682 (1980).

> [T]he term "interrogation" under Miranda refers not only to express questioning, but also to any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response from the suspect. The latter portion of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police.

Rhode Island v. Innis, 446 U.S. at 301; State v. Willis, 64 Wn. App. 634, 637, 825 P.2d 357 (1992).

---

[8] Jackson did not testify that he heard Mr. Sadler invoke his right to counsel. 1RP 79-80.

Here, if one focuses on the perceptions of Mr. Sadler, telling him that his entire house and possessions would be searched and other facts related to charges against him would certainly be likely to elicit a response; in fact, it would be significant if Mr. Sadler had failed to respond. Once Mr. Sadler invoked his right to counsel, all further communications with him should have stopped and the trial court erred in failing to suppress his statement to Detective Jackson along with his un-warned statements to Officer Norling.

b. Cr 3.6

The physical evidence found after the warrantless entry into Mr. Sadler's house and the physical evidence seized pursuant to a warrant should be suppressed. The initial warrantless entry by Officer Norling and Deputy Rather was not justified either under the community caretaking, emergency or exigent circumstance exceptions to the warrant requirement; nor was a protective sweep search justified. Mr. Sadler did not consent to the entry. The information used to obtain a search warrant was a fruit of the initial illegal entry.

A warrantless search and seizure is per se unreasonable under both article 1, section 7 of the Washington Constitution and the Fourth Amendment to the United States Constitution. Under article one, section

7, warrantless searches are presumed unreasonable. State v. Morse, 156 Wn.2d 1, 7, 123 P.2d 832 (2005); State v. White, 135 Wn.2d 761, 769, 958 P.2d 982 (1998). The state bears a heavy burden to show that a warrantless search and seizure falls within one of the jealously-drawn exceptions to the warrant requirement. Morse, 156 Wn.2d at 7; State v. Parker, 139 Wn.2d 486, 496, 987 P.2d 73 (1999). To fit within an exception, the entry must be limited to the reason for the exception; exceptions are not devices to undermine the warrant requirement. State v. Ladson, 138 Wn.2d 343, 356, 979 P.2d 833 (1999).

(i) community caretaking exception

The warrantless entry and search was not justified under the community caretaking exception. The community caretaking exception applies under two circumstances: (1) when the police are making a routine check on health or safety; and (2) when necessary for police officers to render aid or to to respond to an emergency in order to render aid or assistance. State v. Thompson, 151 Wn.2d 793, 8-2, 92 P.3d 228 (2004; State v. Kinzy, 141 Wn.2d 373, 385, 5 P.3d 668 (2000).

"The community caretaking function must always be divorced from a criminal investigation." State v. Link, 136 Wn. App. 685, 696, 150 P.3d 610 (2007)(citing State v. Kypreos, 115 Wn. App. 207, 217, 61 P.3d 352

(2002), review denied, 149 Wn.2d 1029 (2003)). "Broadly stated, a law enforcement officer's job is always to serve and protect the community. But where an officer's primary motivation is to search for evidence or make an arrest, this broader purpose does not create an exception to the search warrant requirement." Link, 136 Wn. App. at 696 (citing State v. Gocken, 71 Wn. App. 267, 275-277, 857 P.2d 1074, review denied, 123 Wn.2d 1024 (1994)).

In Link, the reviewing court held that although the officer was concerned about the safety of the children when he entered the apartment, his primary purpose was to investigate a possible methamphetamine lab and therefore the officer's entry did not fall within the community caretaking exception to the warrant requirement. Link, at 696.

The decision in Link is consistent with the criteria set forth by the Supreme Court for when the exception applies: (1) "the community caretaking function may not be a pretext for criminal investigation"; (2) the invasions of privacy by the officers acting as community caretakers must be necesssary and strictly relevant to a noncriminal investigation; and (3) the investigation must end when reasons for initiating the encounter are dispelled. Kinzy, 141 Wn.2d at 394-395.

Here, the investigation was not for a non-criminal purpose. The police were at the outset investigating whether K.T. was a runaway and whether Mr. Sadler was engaging in illegal sexual conduct with her. 1RP 28-31. The entry into Mr. Sadler's house was not justified by the community caretaking function. Even if Norling and Rather were motivated only to locate K.T., once Mr. Sadler answered the door, confirmed that K.T. was there and clearly showed that he was going to go get her, the reasons for initiating the contact were over. K.T. had been located. Norling's entry at that point was for criminal investigation and not justified under the community caretaking function.

(ii) emergency exception

An emergency exists, justifying a warrantless entry, where the police reasonable believe there are persons in "imminent danger of death or harm, or where there are objects likely to burn or explode." State v. Muir, 67 Wn. App. 149, 154, 835 P.2d 1049 (1992); State v. Smith, 137 Wn. App. 262, 203, 153 P.3d 199 (2007); State v. Loewen, 97 Wn.2d 562, 568, 647 P.2d 489 (1982). Moreover, in order to uphold a search under this exception, the court "must be satisfied that the claimed emergency was not simply a pretext for conducting an evidentiary search and instead was 'actually motivated by a perceived need to render aid or

assistance.'" State v. Lynd, 54 Wn. App. 18, 21, 771 P.2d 770 (1989) (citing Loewen, 97 Wn.2d at 568 (1982)).

Here there was no emergency and no reason to believe that K.T. was in imminent danger of death or injury; the entry and search were to conduct a criminal investigation. If the police went to Mr. Sadler's house solely to locate K.T., that goal was completed with Mr. Sadler confirmed that she was at the house and went to get her. There was no emergency. Moreover, the police had no reason to believe that K.T. was in danger of imminent death or harm. At the least, they were obligated to wait until K.T. appeared at the door or Mr. Sadler had a reasonable time to contact her and have her come to the door.

(iii) exigent circumstance

The relevant considerations for an exigent exception are: "(1) the seriousness or violence of the offense with which the suspect is to be charged, (2) whether the suspect is reasonably believed to be armed, (3) whether there is reasonably trustworthy information that the suspect is guilty, (4) whether there is strong reason to believe that the suspect is on the premises, (5) the likelihood that the suspect will escape if not swiftly apprehended, and (6) whether the entry was made peaceably." Smith, at 202; State v. Cardenas, 146 Wn.2d 400, 406, 47 P.3d 127 (2002). These

exigencies generally pertain to a fleeing suspect, hot pursuit, danger to an arresting officer or the public or destruction of evidence. State v. Counts, 99 Wn.2d 54, 60, 659 P.2d 1087 (1983).

There was no argument of exigent circumstances here, nor did the trial court find any exigencies under this exception. CP 27-276. There was no reason to believe either that Mr. Sadler was armed or that he would escape if not swiftly apprehended. He answered the door, acknowledged that he was Stanley Sadler, agreed that K.T. was present and in the house and turned to go get her. Moreover, the police knew in advance of going to the house that Mr. Sadler was a suspect that they would likely detain. There was no hot pursuit.

(iv) protective sweep

In any event, Deputy Rather had no justification for the protective sweep during which most of the evidence submitted at trial was seized.

If a sweep or a residence extends beyond the immediate area of an arrest, "There must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Maryland v. Buie, 494 U.S. 325,

334-335, 110 S. Ct. 1093, 108 L. Ed. 2d 276 (1980); State v. Hopkins, 113 Wn. App. 954, 959, 55 P.3d 691 (2002).

A general desire to be sure no one is hiding in the house to be searched is not sufficient to go beyond the immediate area of the search. Hopkins, 113 Wn. App. at 960 (citing State v. Shafer, 98 P.2d 961 (Idaho App. (1999); United States v. Ford, 312 U.S. D.C. 301, 56 F.3d 265, 270 (D.C. Cir. 1995), Runge v. State, 701 So.2d 1182, 1186 (Fla. App. 1997); Earley v. State, 789 P.2d 374, 377 (Alaska App. 1990)).

Here, there was simply no information to suggest that another person was present or that another person would be hiding in the house and posing a danger to the persons at the house. In the absence of any such evidence, there was no justification for a protective sweep.[9]

(v) consent

Although the state did not argue that Mr. Sadler consented, the trial court concluded that he "impliedly acquiesced to the police entry of his residence." CP 270-276. 1RP 125-126.

---

[9] Although Detective Jackson testified, and the trial court found, that he viewed the inside of the house to get information for his search warrant, appellate counsel is not aware of any authority allowing officers to enter a residence to obtain descriptions for a search warrant. And since the protective sweep was unconstitutional, the fact that Jackson followed the path of other officers is irrelevant and cannot provide a separate basis for collecting evidence. Jackson merely conducted a further warrantless search without any exception to justify it.

To prove consent, the state had the burden of showing, by clear and convincing evidence, that any alleged consent was a free and voluntary waiver. State v. Shoemaker, 85 Wn.2d 207, 210, 533 P.2d 123 (1975); State v. Nelson, 47 Wn. App. 157, 163, 734 P.2d 516 (1987).

Consent to search may not be implied by silence or failure to object when police do not expressly ask for consent. United States v. Jaras, 86 F.3d 383, 390 (5th Cir. 1996); State v. Rison, 116 Wn. App. 955, 963, 69 P.3d 362 (2003); State v. Browning, 67 Wn. App. 93, 98, 834 P.2d 84 (1992). Instead, the state must show an affirmative step taken by the resident that objectively demonstrates consent--such as stepping back from the door and allowing the police to pass by into the home. State v. Bustemante-Davila, 138 Wn.2d 964, 981, 983 P.2d 590 (1999) (citing State v. Raines, 55 Wn. App. 459, 462, 778 P.2d 538 (1989)).

Further, even if the evidence did support an affirmative showing, which it does not, the search was still unconstitutional under State v. Ferrier, 136 Wn.2d 103, 136, 960 P.2d 927 (1998), because Mr. Sadler was never advised of his right to refuse consent.

The fact that Mr. Sadler said that K.T. was upstairs and turned and started up the stairs was insufficient to establish consent.

c. Conclusion

There were simply no grounds for the warrantless entry into the house and the evidence obtained from the entry and the search warrant obtained from the evidence should be suppressed.

Evidence obtained through exploitation of an illegal search must be suppressed. Wong Sun v. U.S., 371 U.S. 471, 487-88, 9 L. Ed. 2d 441, 83 S. Ct. 407 (1963). Evidence obtained as a result of an unconstitutional investigatory seizure must also be suppressed. State v. Cole, 73 Wn. App. 844, 871 P.2d 656 (1994). "Where the original detention is illegal, the government cannot claim any advantage which it gained on the subject of the pursuit by doing the illegal act." State v. Hobart, 94 Wn.2d 437, 447, 617 P.2d 429 (1980), (citing Silverthorne Lumber Co. v. United States, 251 U.S. 385, 64 L. Ed. 2d 319, 40 S. Ct. 182, 24 A.L.R. 1426 (1920)). "[V]iolation of a constitutional immunity automatically implies exclusion of the evidence seized." State v. Boland, 115 Wn.2d 571, 582, 800 P.2d 1112 (1990).

The "undisputed facts," in relevant part, were either not supported by the record, insufficient to justify the warrantless search, or support suppression. The trial court's finding 1 that the police had notice that K.T. was believed to be at Mr. Sadler's, was fourteen years old and might be

portraying herself as nineteen and engaging in sadomasochistic sex established that the officers were conducting a criminal investigation. Finding 2 established that Mr. Sadler told the officers that K.T. was at the house and turned to locate her.

As set out above, the facts that Norling believed that there was an emergency and that Rather conducted a protective sweep (findings 5, 6, 10) did not justify either the entry or the search. CP 270-276.

The facts did not support the conclusion that K.T. was in imminent danger of harm, and the court's conclusion that K.T. may have been "in need of assistance" did not even purport to meet that standard. CP 270-276. Similarly, the court did not conclude that the "safety" sweep was justified by a reasonable belief that there was another person there who presented a danger. CP 270-276.

Finally, the facts do not support the conclusion that Mr. Sadler consented to the search. CP 270-276.

For all of these reasons, the evidence against Mr. Sadler should have been suppressed. Because the trial court failed to do so, Mr. Sadler's convictions should be reversed by this Court and remanded with instructions to suppress the physical evidence against him.

4. THE TRIAL COURT ERRED IN ALLOWING THE STATE TO PRESENT TESTIMONIAL HEARSAY IN VIOLATION OF MR. SADLER'S STATE AND FEDERAL CONSTITUTIONAL RIGHTS TO CONFRONT THE WITNESSES AGAINST HIM.

K.T. did not testify at trial, and was unavailable for cross-examination by Mr. Sadler. The prosecutor argued in closing, however, that K.T. was an eyewitness through her photographs which were admitted as evidence at trial and that her presence in the photographs prevented Mr. Sadler from denying that he engaged in sexual contact with her. RP 2597-2598. The prosecutor was correct; the pictures introduced at trial were used throughout as assertive conduct by K.T. But the prosecution was not content with the advantage of being able to argue that K.T.'s pictures proved the crimes had been committed without having to produce K.T. for cross-examination.

The state was permitted, over defense objection, to elicit testimony from police witnesses about what K.T. had said to them. Officer Nordling testified that when he found her in Mr. Sadler's house, K.T. told him that her stomach and head hurt and that she did not respond when asked how old she was. RP 1724. Officer Villamor testified, over defense objection, that he interviewed K.T. at the hospital, that the conversation included her identification of particular items of evidence in the house, that he passed

along this information to Detective Jackson, and that the identified items were collected as evidence. RP 1601-1603. Villamor described the items he took into evidence. RP 1610-1638.

Detective Jackson testified that he made sure that K.T. was interviewed as he developed probable cause for a warrant and that he used information from her in the warrant affidavit. RP 1651, 1655-1658. Defense counsel objected both to testimony that a judge determined that there was probable cause to issue a warrant and that K.T. provided incriminating evidence used to support the state's case. RP 1652.

The trial court erred in admitting this testimony which denied Mr. Sadler his state and federal constitutional rights to confront the witnesses against him. Since K.T.'s statements were made to police officers about Mr. Sadler's past conduct for the purpose of prosecuting him, the statements were testimonial hearsay. K.T.'s testimonial hearsay allowed the state to put before the jury evidence that K.T. incriminated Mr. Sadler and identified physical evidence which was used to provide probable cause for a search warrant.

The absence of direct quotes did not make the hearsay any less hearsay. State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001) ("Inadmissible evidence is not made admissible by allowing the substance

of a testifying witness's evidence to incorporate out-of-court statements by a declarant who does not testify"): State v. Johnson, 61 Wn. App. 539, 546, 811 P.2d 687 (1991) (detective's testimony that, based on an informant's statement, he had reason to suspect defendant was inadmissible hearsay). The fact that the statements were made to the investigating officers made the hearsay statements testimonial.

As held by the United States Supreme Court in Crawford v. Washington, 541 U.S. 36, 124 S. Ct. 1354, 1359-1374 (2004), admission of testimonial statements where the declarant is unavailable at trial categorically violates the federal confrontation clause: "[w]here testimonal statements are at issue, the only indicium of reliability sufficient to satisfy the constitutional demands is the one the Constitution actually prescribes: confrontation." The Court defined "testimonial statements" to include "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" Crawford, 124 S. Ct. at 1364 (quoting NACDL Amicus Brief). Statements to investigating police officers are testimonial hearsay. Crawford, 124 S. Ct. at 1365.

The testimony by Detective Jackson about developing probable cause for a search warrant was improper and irrelevant. All the jurors needed

to know was that the police seized the evidence introduced at trial lawfully pursuant to a warrant. They did not need to hear Jackson's testimony that he developed probable cause for the warrant or how he did this. As held in State v. Stith, 71 Wn. App. 14, 22, 856 P.2d 415 (1993), it is misconduct for the prosecutor to tell the jury of a court's prior determination of probable cause; this is "tantamount to arguing that guilt had already been determined." Stith, 71 Wn. App. at 22. See also, United States v. Sullivan, 919 F.2d 1403, 1424 (10th Cir. 1990) (implication that the court would have dismissed the charge if the evidence was insufficient was "highly improper"). Detective Jackson's testimony that he developed probable cause was improper under Stith because it was tantamount to telling the jurors that the determination that there was evidence of a crime at the house had already been made by a judicial officer.

Even if the testimony had been relevant, which it was not, it was improper to tell the jurors that K.T.'s statements provided a basis for establishing probable cause to believe that evidence of a crime would be found at Mr. Sadler's house. K.T. was not present at trial to be cross-examined by Mr. Sadler. Introduction of K.T.'s testimonial hearsay therefore denied Mr. Sadler the right to confrontation of witnesses and should require the reversal of his convicitons.

The state exploited K.T.'s absence from trial and the defense's inability to cross-examine her. That was constitutional error.

5. THE TRIAL COURT'S EXCLUSION OF EVIDENCE DENIED MR. SADLER HIS STATE AND FEDERAL CONSTITUIONAL RIGHTS TO APPEAR AND DEFEND AT TRIAL.

The trial court excluded, pretrial, evidence that K.T. had told people other than Mr. Sadler that she was nineteen years old and that she had told another person that she would show him her birth certificate near the time Mr. Sadler testified that K.T. showed her birth certificate to him. RP 110, 124, 146, 151, 184-186, 196. CP 360-369. The trial court refused to reconsider these rulings during trial. RP 2385, 2422-2425, 2431.

Although the court initially ruled that Mr. Sadler would be able to present evidence of anything K.T. communicated to him personally, the court refused to permit the defense to introduce evidence conveyed to Mr. Sadler through K.T.'s profiles on adult websites. RP 1934-1939, 1946. The court also prohibited Mr. Sadler from presenting evidence to rebut the implication raised by the prosecution that he learned that K.T. was born in Michigan and had a Michigan birth certificate from reading the transcript of an interview between K.T.'s mother and the police. RP 2009, 2513-2517, 2393.

K.T.'s profiles on adult websites were not hearsay because the defense sought to introduce them through Mr. Sadler's testimony -- not for the truth of the matter asserted in them -- but as relevant to the issues of whether K.T. told him she was nineteen years old and to the reasonableness of his belief that she was in fact nineteen years old. Information on K.T.'s profiles was also relevant to some of the equipment used in the photographs introduced by the state at trial and the implication during cross-examination that K.T. would not willingly engaged in conduct with that equipment. RP 1934-1939, 1946. Mr. Sadler had the right to present evidence which was both relevant and material to his defense. See State v. Roberts, 80 Wn. App. 342, 351, 908 P.2d 892 (1996).

Evidence that K.T. habitually told other men that she was nineteen was similarly admissible under ER 406 and relevant to prove that K.T. acted in conformity with her habit of portraying herself as nineteen with Mr. Sadler.[10] Moreover, since K.T. was effectively a witnesses at trial through her photographs and the assertions implicit in them, under ER 806, her credibility could be attacked through hearsay.

---

[10] ER 406 provides that "Evidence of the habit of a person . . . whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice."

Evidence that K.T. offered to show another man in Tennessee her birth certificate on August 22, 2004, the day Mr. Sadler testified she showed him her birth certificate via webcam, also made it more likely she had a birth certificate at that time. This corroborated Mr. Sadler's testimony on what turned out to be the most crucial issue at trial. It was also relevant and admissible to rebut the question by the prosecutor of Mr. Sadler if there was only his word that he identified K.T. by her birth certificate. RP 2415. If nothing else, this question opened the door to proof that K.T. offered to show her birth certificate to someone else on the same date.

Similarly, testimony from the defense investigator was relevant to rebut the state's attempt to show that Mr. Sadler learned that K.T.'s birth certificate was from Michigan from the transcript of a taped interview between the police and Ms. Farnam. RP 2009, 2393. The defense investigator would have testified that Mr. Sadler told him that K.T.'s birth certificate was from Michigan before her mother disclosed this in the interview. RP 2513-2517.

The admission of evidence by the defense on a topic introduced by the state may be essential to the jury's ability to find the truth. State v. Gefeller, 76 Wn.2d 449, 455, 458 P.2d 17 (1969); K. Teglund, Wash.

Prac., Evidence, section 11 (3rd ed. 1989). Where the state opens the door by presenting evidence, as a matter of fundamental fairness, the defense must be given the opportunity to inquire further on the subject. "The Washington Supreme Court has stated that it would be a curious rule of evidence which allowed one party to bring up a subject, drop it at a point where it might appear advantageous to him, and then bar the other parties from further inquiries about it." State v. Lougin, 50 Wn. App. 376, 380, 749 P.2d 173 (1988) (citing State v. Gefeller, 76 Wn.2d at 455).

The Gefeller court stated not only an evidentiary principle, but a constitutional principle of due process of law, the "two-way street" principle. See e.g. Wardius v. Oregon, 412 U.S. 470, 472, 93 S. Ct. 2208, 37 L. Ed. 2d 82 (1973).

The ruling by the court that the profiles and computer profiles could not be authenticated was also clearly erroneous. RP 2431. ER 901 requires only "evidence sufficient to support a finding that the matter in question is what its proponent claims." There was no serious question at trial about the authenticity of the profiles and e-mail exchanges between K.T. and others from her mother's computer.

As a result of the trial court's rulings, Mr. Sadler was denied his fundamental rights to fully defend himself at trial and to present evidence in his own behalf.

The United States Supreme Court has consistently held that a defendant's right to call witnesses and defend at trial is fundamental and that even the rules of evidence must yield to those fundamental rights. Most recently in Holmes v. South Carolina, 547 U.S. 319, 126 S. Ct. 1727, 164 L. Ed. 2d 503 (2006), the Court that a criminal defendant's constitutional rights are violated by an evidence rule under which the defendant may not introduce evidence that another person committed the crime if the prosecution has forensic evidence which strongly supports a guilty verdict. In so holding, the Supreme Court set out the limitations on the right of state courts to exclude evidence: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or ConFrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense.'" Holmes, 164 L. Ed. 2d at 509 (quoting Crane v. Kentucky, 476 U.S. 683, 690, 106 S. Ct. 2142, 90 L. Ed. 2d 638 (1998) and California v. Trombetta, 467 U.S. 479, 81 L. Ed. 2d 413, 104 S. Ct. 2528 (1984)).

The Holmes court then gave numerous examples of such arbitrary rules, which have been held to unconstitutionally hamper the right to present a complete defense. These cases included Washington v. Texas, 388 U.S. 14, 19, 18 L. Ed. 2d 1019, 87 S. Ct. 1920 (1967), a case in which a state statute barred a person who had been charged as a codefendant in the case from testifying in the defense of another codefendant unless the witness had been acquitted of the charge. The Supreme Court held that this rule unconstitutionally burdened the right to present a defense.

In Chambers v. Mississippi, 410 U.S. 284, 35 L. Ed. 2d 297, 93 S. Ct. 1038 (1973), the Supreme Court held that a state hearsay rule prohibiting a party from impeaching his or her own witness improperly precluded the defendant from examining a witness who had confessed to the crime and unconstitutionally denied the defendant his right to present witnesses and evidence negating the elements of the charged crime. In Rock v. Arkansas, 483 U.S. 44, 97 L. Ed. 2d 37, 107 S. Ct. 2704 (1987), the Court held that an Arkansas evidentiary rule excluding all post-hypnosis testimony unconstitutionally burdened the defendant's right to testify at trial. In Crane v. Kentucky, the Court held that a defendant cannot be

prohibited from trying to establish that the circumstances under which his confession was obtained showed its unreliability.

What is at issue in this case is Mr. Sadler's constitutional right to present evidence in support of an affirmative defense to the rape charge and to negate the elements of the kidnapping charges, which was particularly constrained because K.T. was not available as a witness.

The exclusion of this evidence denied Mr. Sadler his state and federal constitutional rights to compulsory process and to appear and defend at trial. The exclusion of the evidence should require reversal of his convictions.

6. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL AFTER DETECTIVE JACKSON TESTIFIED THAT MR. SADLIER HAD EXERCISES HIS RIGHT TO REMAIN SILENT AND TO COUNSEL.

Defense counsel moved for a mistrial after Detective Jackson testified that when Mr. Sadler told him that K.T. said she was nineteen, he responded, "Hey, I'm not asking questions, you asked for an attorney." RP 1657, 1660. Detective Jackson's testimony came after he had been specifically cautioned not to mention Mr. Sadler's request for counsel. RP 1660. As defense counsel argued, this testimony directly commented on Mr. Sadler's exercise of this right to remain silent and placed before the

jury the fact that Mr. Sadler had been uncooperative with the police. RP 1660-1665. The trial court erred in denying the motion for mistrial.

Once the jury heard that Mr. Sadler had asked for an attorney and questioning had stopped, there was no way to remove that taint -- and the implication that he invoked his rights because he was guilty -- from the jury. There was absolutely no reason for Detective Jackson to have referred to Mr. Sadler's invocation of rights after just being cautioned not to do so, and nothing short of a new trial could cure the error. RP 1657. Thus, all of the criteria for when a mistrial should be granted are met: (1) the irregularity was serious; (2) the irregularity did not involve mere cumulative evidence; and (3) the trial court instructed the jury to disregard the testimony, but nothing short of a new trial could cure the error. State v. Hopson, 113 Wn.2d 273, 284, 778 P.2d 1014 (1989).

Under well-established authority, an accused person has a constitutional right to remain silent, even before his arrest, that derives from the Fifth Amendment. State v. Easter, 130 Wn.2d 228, 238, 922 P.2d 1285 (1996). Here, Mr. Sadler had been arrested and read his Miranda warning. The state may not elicit testimony or comment on the defendant's exercise of his right to remain silent to imply guilt from such silence. Easter, 130 Wn.2d at 243; State v. Lewis, 130 Wn.2d 700, 705,

927 P.2d 235 (1996); State v. Perrett, 86 Wn. App. 312, 322, 936 P.2d 426 (1997). It is error to permit the state to ask the jury to draw negative inferences from the exercise of *any* constitutional right. See State v. Johnson, 80 Wn. App. 337, 339-340, 908 P.2d 900 (1996); State v. Jones, 71 Wn. App. 798, 810, 963 P.2d 85 (1993), review denied, 124 Wn.2d 1018 (1994); Doyle v. Ohio, 426 U.S. 610, 619, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1980); Dyson v. United States, 418 A.2d 127, 131 (D.C. 1980).

A direct comment on the exercise of the right to remain silent occurs when the state elicits direct testimony that the accused exercised his right and therefore did not cooperate with the investigation. For example, in State v. Romero, 113 Wn.App. 779, 787, 54 P.3d 1255 (2002), the testimony, "I read him his Miranda warnings, which he chose not to waive and would not talk to me," was held to be a direct comment on the exercise of the right to remain silent. For another example which is directly on point, in State v. Curtis, 110 Wn. App. 6, 37 P.3d 1274 (2002), the comment that the defendant refused to talk saying he wanted an attorney was held to be a direct comment on the right to remain silent

Either a direct or indirect comment on the defendant's silence may be raised for the first time on appeal, and a direct comment on the evidence is not harmless unless proven to be beyond a reasonable doubt. Romero,

113 Wn.App. at 790-791; State v. Gutierrez, 50 Wn. App. 683, 688, 749 P.2d 213 (1988). Here, defense counsel objected and the court sustained the objection and instructed the jury to disregard the comment. RP 1665-1666, 1673. The issue of the improper denial of the motion for mistrial was preserved for appeal.

Here the state commented directly on the right to remain silent and to counsel. Detective Jackson said he was not asking questions because of the request for counsel. RP 1660. This was a direct comment on the exercise of the rights to remain silent and to access to counsel.

These direct comments denied Mr. Sadler his state and federal constitutional rights to due process of law. The error was not harmless beyond a reasonable doubt. Credibility was the key issue at trial. The error was harmful and unfairly prejudicial. The trial court erred in denying Mr. Sadler's motion for mistrial and his convictions should now be reversed on appeal.

7. THE TRIAL COURT ERRED IN DENYING THE DEFENSE MOTION FOR MISTRIAL AFTER THE PROSECUTOR ASKED MR. SADLER IF THE REASON HE DID NOT RECEIVE A PARTICULAR E-MAIL WAS BECAUSE HE HAD BEEN IN JAIL SINCE HIS ARREST.

The prosecutor improperly asked Mr. Sadler if the reason that he had not read Ms. Haugenberry's e-mail to him was because he had been

in jail. RP 2089-2090, 2112-2118. This unnecessarily and improperly put before the jury Mr. Sadler's custodial status and the implication that he was too dangerous to be released on bond pending appeal. The trial court erred in denying Mr. Sadler's motion for mistrial following this improper question. RP 2118. The prosecutor's question conveying to the jury Mr. Sadler's custodial status denied him his state and federal constitutional rights to the presumption of innocence. The trial court's finding that the improper question did not require a mistrial "when viewed against the backdrop of the evidence," applied a legally unsupportable standard. It is not for the court to base rulings on its view of the evidence of guilt or to deny the presumption of innocence in cases which may need it most.

An accused person is "entitled to the physical indicia of innocence which includes the right of the defendant to be brought before the court with the appearance, dignity, and self-respect of a free and innocent man." State v. Finch, 137 Wn.2d 792, 844, 975 P.2d 967 (1999) (citations omitted). For that reason, having the defendant appear before the jury in jail clothes, or with other evidence of his in-custody status, denies him the presumption of innocence. Estelle v. Williams, 425 U.S. 501, 48 L. Ed. 2d 126, 96 S. Ct. 1691, reh'g denied, 426 U.S. 954 (1976); State v. Hartzog, 96 Wn.2d 383, 398, 635 P.2d 694 (1981).

Here, although Mr. Sadler was not in jail clothing, the prosecutor's improper reference to the fact that he was in jail awaiting trial denied him the presumption of innocence to which he was constitutionally entitled and should require reversal of his convictions.

8. THE PROSECUTOR COMMITTED MISCONDUCT BY ARGUING IN CLOSING REBUTTAL AN ERRONEOUS DEFINITION OF A CRITICAL WORD IN A JURY INSTRUCTION WITHOUT ANY LEGAL BASIS.

In closing rebuttal argument, after the defense had no further opportunity to respond, the state argued that the phrase "requires production" in Instruction No. 27 could not be satisfied with seeing a birth certificate of identification over a webcam. RP 2670-2671, 2670.

Instruction 27 provided, in relevant part, that:

> It is, however, a defense to the charge of sexual exploitation of a minor that at the time of the offense the defendant made a reasonable bona fide attempt to ascertain the true age of the minor by *requiring production* of a driver's license, marriage license, birth certificate, or other governmental or educational identification card or paper and did not rely solely on the oral allegations or apparent age of the minor.

(emphasis added).

The prosecutor argued expressly that "Instruction No. 27 requires production of the identification, not a request to see it on a webcam. . .

. The law requires production, not seeing it over a fuzzy webcam . . . ." RP 2670-2671.

The jury almost surely relied on this improper argument as it convicted Mr. Sadler only of the eight counts of sexual exploitation of a minor and acquitted him of all other counts, including the counts where the affirmative defenses did not require production of identification. CP 473-535; 398-472. The jurors also asked for a definition of the words "requiring production," but did not receive one. CP 394-395; RP 2686.

In fact, the term production, as noted by defense counsel, includes "the act of producing or to offer to view or notice." RP 2689.

Webster's College Dictionary includes the definition, "the act of presenting for display; presentation; exhibition." (Random House 2001).

There is simply no authority supporting the prosecutor's argument that holding a birth certificate up for viewing via webcam does not constitute production for purposes of the affirmative defense. No case interpreting RCW 9.68.110(3), which sets out the affirmative defense, supports that interpretation.

Under article IV, section 16, "Judges shall . . . declare the law." It is misconduct for the prosecutor to usurp this role and misstate the law

in closing argument. State v. Fleming, 83 Wn. App. 209, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997).

Where there is a "substantial likelihood" that the prosecutor's misconduct affected the jury's verdict, the defendant is deprived of the fair trial he is guaranteed by the Fourteenth Amendment. See State v. Belgarde, 110 Wn.2d 504, 508, 755 P.2d 174 (1988). Where, as here, defense counsel does not object to the misconduct, appellate review is not precluded (1) if the cumulative effect of the misconduct rises to the level of manifest constitutional error that is not harmless beyond a reasonable doubt, State v. Fleming, 83 Wn. App. at 216; or (2) "if the prosecutorial misconduct is so flagrant and ill-intentioned that no curative instructions could have obviated the prejudice engendered by the misconduct." Belgarde, 110 Wn.2d at 507.

Here, the jury's verdicts demonstrate that the jurors found by the preponderance of the evidence that Mr. Sadler reasonably believed K.T. was at least sixteen years old based on her declarations to him as to her age and that he did not possess facts which would reasonably lead him to know that K.T. was a minor. CP 253-254 (Instructions nos. 16, 27, 33, 64). The jurors, however, must have found that Mr. Sadler had not established that he made a bona fide attempt to ascertain K.T.'s age by

"requiring production" of her identification or birth certificate. They were misled by the prosecutor's erroneous statement that having K.T. show her birth certificate via webcam was not "requiring production." RP 2670-2671. Thus, the prosecutor's statement of the law which was not based on either the court's instruction or any authority or common definition of the word "production" was misconduct which rose to the level of manifest error which was not harmless beyond a reasonable doubt. Thus, the misconduct should be subject to review and should require the reversal of Mr. Sadler's convictions. The prejudice was overwhelmingly and unfairly prejudicial.

9. THE TRIAL COURT ERRED IN NOT GIVING MR. SADLER'S PROPOSED SUPPLEMENTAL INSTRUCTION DEFINING THE TERM THAT THE JURORS REQUESTED CLARIFICATION OF.

Defense counsel was unable to attend the hearing during which the question of how to respond to the jury's request for a definition of "requiring production" was discussed. RP 2686. Although the attorney who stood in for him agreed with the response that "No additional instructions or definitions will be provided," defense counsel proposed a supplemental instruction when he learned of the question and before the jurors had announced they had reached a verdict. RP 2686, 2689. Counsel further proposed after the jury had announced that they had reached a

verdict that they should receive a supplemental instruction defining "production," and begin deliberating at the point where they had a question about the meaning of the word. RP 2695-2696. The court erred in denying this request. RP 2696.

Defendants are entitled to instructions which correctly state the law and permit them to argue their theory of the case. State v. MacMaster, 113 Wn.2d 226, 233, 778 P.2d 1037 (1989); State v. Mark, 94 Wn.2d 520, 526, 618 P.2d 73 (1980). A "defendant is entitled to a correct statement of the law and should not have to convince the jury what the law is." State v. Thomas, 109 Wn.2d 222, 228, 743 P.2d 816 (1987) (citing State v. Acosta, 101 Wn.2d 612, 621-622, 683 P.2d 1069 (1984)).

Jury instructions are sufficient only if they (1) permit the defense theory of the case to be satisfactorily argued to the jury; and (2) are not misleading as to the jury's function and responsibilities under the law; and (3) when read as a whole, properly inform the trier of fact of the applicable law. State v. Rice, 110 Wn.2d 577, 757 P.2d 889 (1988); State v. Aver, 109 Wn.2d 303, 745 P.2d 479 (1987).

The trial court has discretion to give instructions which supplement or clarify statutory language as long as the instructions correctly state the law. State v. Kepiro, 61 Wn. App. 116, 124, 810 P.2d 19 (1991).

Here, the jurors were confused because of the prosecutor's argument in rebuttal during closing argument, and they properly sought to have the judge clarify for them the definition of "requiring production," so that they would not have to rely on the state to provide that definition. The court should have given a definition which was supported by dictionary usage. In failing to do so, the trial court denied Mr. Sadler a fair trial and likely contributed to his conviction based on an erroneous statement of the law. He was denied the right to have an instruction which allowed him to argue his theory of defense. The error in failing to give the supplemental instruction should require reversal of Mr. Sadler's convictions.

10. CUMULATIVE ERROR DENIED MR. SADLER A FAIR TRIAL.

It is well settled that the combined effects of error may require a new trial, even when those errors individually might not require reversal. State v. Coe, 101 Wn.2d 772, 789, 684 P.2d 668 (1984); United States v. Preciado-Cordobas, 981 F.2d 1206, 1215 n.8 (11th Cir. 1993) (recognizing that cumulative error can deny a defendant due process even where the individual errors were harmless). Reversal is required where the cumulative effect of several errors is so prejudicial as to deny the defendant a fair trial. Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992); United States v. Pearson, 746 F. 2d 789, 796 (11th Cir. 1984).

Here, the trial errors combined to deprive Mr. Sadler a fair trial. The state was permitted to introduce testimonial hearsay in violation of the Sixth Amendment while Mr. Sadler was denied his fundamental rights to defend at trial and present evidence in his own behalf. The jury improperly heard that Mr. Sadler had been confined in jail pending trial and that he exercised his right to remain silent and to counsel. Further, the prosecutor misinformed the jury about the requirements of the law during rebuttal closing argument, and Mr. Sadler was not given any opportunity to correct that misinformation. This combination of misconduct and failure to clarify the law denied Mr. Sadler a fair trial, and all of the errors together as well as individually should require reversal of Mr. Sadler's convictions.

E. CONCLUSION

Appellant respectfully submits that his convictions should be reversed and remanded with instructions to suppress his custodial statements and the physical evidence seized from his house.

DATED this 14th day of June, 2007.

Respectfully submitted,

RITA J. GRIFFITH
WSBA No. 14360
Attorney for Appellant

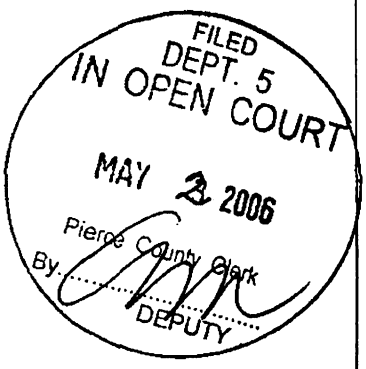
CERTIFICATE OF SERVICE

I certify that on the 14th day of June 2007, I caused a true and correct copy of the Opening Brief of Appellant to be served on the following via prepaid first class mail:

Counsel for the Respondent:
Kathleen Proctor
Office of Prosecuting Attorney
930 Tacoma Ave. S., Rm. 946
Tacoma, Washington 98402-2171

Stanley Sadler
DOC #89135
Washington Corrections Center
P.O. Box 900
Shelton, WA 98584

Rita J. Griffith 6/14/07
Rita J. Griffith DATE at Seattle, WA



SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

STATE OF WASHINGTON, Plaintiff, vs. STANLEY SCOTT SADLER, Defendant.	CAUSE NO. 04-1-04384-2 FINDINGS AND CONCLUSIONS ON ADMISSIBILITY OF EVIDENCE PURSUANT TO CrR 3.6 and ADMISSIBILITY OF STATEMENTS PURSUANT TO CrR 3.5.

THIS MATTER came on before the Honorable Vicki L. Hogan on the 17th day of March, 2005, for motions pursuant to CrR 3.5 and CrR 3.6. The defendant was present and represented by his attorney, Michael Schwartz. The State was present and represented by Deputy Prosecuting Attorney Rosalie Martinelli. The court heard testimony, observed the demeanor and manner of witnesses, and read pleadings submitted by the parties. The court was duly advised in all matters. The court, having rendered an oral ruling thereon, makes the following Findings of Fact and Conclusions of Law as required by CrR 3.5 and CrR 3.6.

THE UNDISPUTED FACTS

1. On September 12, 2004, the Fircrest Police Department received a notice from Clark County Sheriff's Department that requested assistance in locating a juvenile, K.T., who disappeared from Clark County two weeks prior. The notice listed the defendant and his address

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

as being a location where the missing juvenile may be. The notice stated that K.T. was 14 years old and may be involved in sadomasochistic sex and that she may portray herself as 19.

2. On September 12, 2004, at approximately 1650 hours, Fircrest Officer Eric Norling and Pierce County Sheriff's Deputy Christopher Rather responded to the defendant's address of 4331 67th Avenue West in University Place, Washington. Officer Norling repeatedly knocked and pounded on the front door and rang the doorbell several times. There was no answer. As Officer Norling began to walk away, a male who appeared to be in his 40's and sweating profusely, answered the door. The man appeared surprised.

3. Officer Norling asked the male if he was Stanley Sadler, and the defendant stated that he was. Officer Norling asked if K.T. was there. The defendant stated that she was and turned and started walking upstairs. Officer Norling followed the defendant to the master bedroom upstairs. The defendant's back was to Officer Norling during the walk upstairs. The defendant never verbally objected to Officer's Norlings presence inside the residence.

4. Officer Norling looked into the master bedroom and saw a juvenile female laying on the bed in the fetal position. The juvenile was wearing a very short plaid skirt that was pulled up just below her waist. She did not have any underwear on and her buttocks were exposed. Officer Norling noticed chains on the bed frame and some leather cuffs on the nightstand. He also observed a very large vibrator in the room.

5. Officer Norling stated that he entered the residence because he thought an emergency existed as he needed to recover the missing juvenile and make sure she was okay.

6. When Deputy Rather noticed Officer Norling go into the defendant's residence, he went to the front door, went inside, and started to perform a protective sweep of the residence.

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

7. While in the master bedroom, Officer Norling called K.T.'s name several times, but received no response. He asked her how old she was, but continued to get no response. Officer Norling requested that Deputy Rather come upstairs and detain the defendant pending the investigation. The defendant was on his way back downstairs when Deputy Rather detained the defendant by handcuffing him and directing that he sit on the floor.

8. Officer Norling continued to attempt to awaken K.T., who appeared to be either unconscious or sleeping. Officer Norling pushed K.T.'s foot. K.T. jumped and started to moan and say her stomach hurt and she was dizzy. The fire dept. was called for medical assistance. Officer Norling remained with K.T.

9. Deputy Rather continued his protective sweep of the residence to determine if any other people were inside. During the sweep, Deputy Rather looked into a bedroom across the hall from where K.T. was located. The bedroom was covered in black plastic and there was a large amount of sex-related "bondage" equipment inside the room. There was also a bench in the middle of the room as well as a video camera on a tripod. No other people were located inside the residence.

10. During the protective sweep, Deputy Rather did not touch or disturb any items inside the defendant's residence. Officer Norling also did not touch or disturb any items inside the residence.

11. Officer Norling read the defendant his Miranda warnings with the assistance of a department issued card. The defendant stated that he understood his warnings and wished to speak with Officer Norling. The defendant did not appear confused and was able to track Officer Norling's statements and questions appropriately.

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

12. After being asked, the defendant stated that K.T. had been staying with him for about a week and said, "She told me she was 19."

13. The defendant was placed in Officer Norling's patrol car. Officer Norling stated that he told the defendant that K.T. was a runaway and was 14 years old. The defendant yelled, "She told me she was 19."

14. Officer Norling later asked the defendant if police could search his residence. The defendant stated that he wanted an attorney.

15. Pierce County Sheriff's Detective Bob Jackson was dispatched to the scene. In preparation for a search warrant, Det. Jackson entered the defendant's residence to get a description of the house for purposes of writing a search warrant. Det. Jackson went into the residence with Officer Norling and purposefully only walked where Officer Norling and Deputy Rather had previously been. Det. Jackson did not touch or disturb any items within the residence. Det. Jackson recorded his own observations in the complaint for search warrant.

16. After Det. Jackson viewed the inside of the defendant's residence, he approached the defendant, who was still sitting in a patrol car, and, as a courtesy, told him that he would be requesting a search warrant for the residence and that he would be looking for evidence. Det. Jackson also told the defendant that K.T. was a 14-year-old runaway. In response to the Det. Jackson's statements, the defendant stated, "She told me she was 19." Det. Jackson reminded the defendant that he asked for an attorney and not to say anything. Det. Jackson told the defendant that he was just informing him of the status of the investigation, to which the defendant again stated, "She told me she was 19."

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

17. Det. Jackson went to the hospital to gather information from K.T. and then went to the station to write an application for a search warrant. The search warrant took over two hours to write. It was eventually signed and a search of the defendant's residence was executed.

THE DISPUTED FACTS

There are no disputed facts.

FINDINGS AS TO DISPUTED FACTS

Not applicable.

REASONS FOR ADMISSIBILITY OR INADMISSIBILITY OF THE EVIDENCE

1. Officer Norling and Deputy Rather entered the defendant's residence lawfully.

2. There were exigent circumstances which necessitated police entry into the residence:

A. Officer Norling and Deputy Rather believed that a missing juvenile may be inside the residence and in need of assistance;

B. A reasonable person under the same circumstances would have believed an emergency existed given the totality of the circumstances: The defendant's delayed response in answering front door after several knocks and doorbell rings by police, the defendants profuse sweating and startled expression, the defendant's age, the defendant's statements that K.T. was inside his residence, and that K.T. was a reported missing juvenile who may be involved in sadomasochistic sex; and

C. Officer Norling only entered the residence to locate and assist a missing juvenile female that apparently was inside the defendant's residence. Deputy Rather merely entered the residence to back-up Officer Norling and provide a safety sweep of the residence. Officer Norling and Deputy Rather were only inside the residence for a short period of time and did not disturb ~~or otherwise search the residence for evidence.~~ or touch anything in the residence. (VH)

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

3. Officer Norling and Deputy Rather were also performing their community caretaking function as police officers in providing assistance to a missing juvenile who was inside the residence of an adult male.

4. The defendant impliedly acquiesced to the police entry of his residence.

5. Deputy Rather's routine protective sweep of the residence was lawful and done only for purposes of officer safety. The sweep did not exceed the scope of its intended purpose.

6. Det. Jackson's entry into the defendant's residence was made for purposes of obtaining information for a search warrant and did not exceed the areas already breached by Officer Norling and Deputy Rather. ~~Det. Jackson did not search the residence~~. Det. Jackson's entry was not improper.

7. The defendant was in-custody at the time Officer Norling read the defendant his Miranda warnings.

8. Officer Norling properly read the defendant his Miranda warnings.

9. The defendant's subsequent statements to Officer Norling were made knowingly, intelligently, and voluntarily and are admissible at trial.

10. The defendant's statements to Det. Jackson were made spontaneously by the defendant and were not made as a result of custodial interrogation. Those statements are also admissible at trial.

DONE IN OPEN COURT this 2 day of May, 2006.

FILED
DEPT. 5
IN OPEN COURT
MAY 2 2006
Pierce County Clerk
By ..... DEPUTY

Vicki M. Hogan
JUDGE

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400

Presented by:

ROSIE MARTINELLI
Deputy Prosecuting Attorney
WSB # 25078

Approved as to Form:

MICHAEL E. SCHWARTZ
Attorney for Defendant
WSB # 21824

Office of the Prosecuting Attorney
930 Tacoma Avenue South, Room 946
Tacoma, Washington 98402-2171
Main Office: (253) 798-7400